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Textbooks

IN THE

Supreme Court of the United States

October Term, 1970
No. 534

UNITED STATES OF AMERICA,

Appellant,

vs.

NORMAN GEORGE REIDEL,

Appellee.

On Appeal From the United States District Court for the Central District of California.

BRIEF FOR APPELLEE.

Questions Presented.

1. Whether Title 18 U.S.C. §1461, in the light of the First and Fifth Amendments and the decisions in *Redrup, Stanley* and *Rowan,* can be constitutionally applied to the mailing of alleged obscene material to willing adults.

2. Whether Title 18 U.S.C. §1461, on its face and as construed and applied by the indictment, violates the free speech and press, due process, and equal protection provisions of the First and Fifth Amendments.

Statement.

The three-count indictment charged violations of Title 18 U.S.C. §1461 [A. 5-6]. The defendant moved to dismiss the indictment upon the grounds, among others, that each of the counts of the indictment failed to state facts sufficient to constitute an offense against the United States; failed to state facts sufficient to constitute an offense because each count of the indictment failed to state that the material was mailed to a minor or to an adult who did not want to receive the material; and that the statute, on its face and as construed and applied, violated the free speech and press, due process, equal protection provisions, and other provisions of the Constitution [A. 7-9].[1]

The hearing on the motion to dismiss the indictment, and the other motions, came on before Honorable Harry Pregerson, a Judge of the United States District Court for the Central District of California [A. 10]. It was stipulated by appellant that the material in Count Three of the indictment was a mailing in response to a solicitation by an adult [A. 11, 14-15]. The government stipulated further that as to the other two counts in the indictment it had no evidence of an unsolicited receipt, nor was there any evidence that the addressees in the other counts were juveniles [A. 11-12, 14-15; Tr. 21]. The government argued that under Title 18 U.S.C. § 1461, the question as to whether the recipients were willing or unwilling addressees was irrelevant [A.

[1]There were other motions made prior to trial. There was a motion for return of property and to suppress evidence, pursuant to Fed. Rules Cr. Proc. rule 41, upon the grounds generally, that the warrant upon which the massive seizure was made was a general warrant, issued without a prior adversary hearing and without probable cause. There was also a motion for a bill of particulars, pursuant to Fed. Rules Cr. Proc. rule 7(f).

11-12; Tr. 19]. In the light of the stipulated record and the allegations contained in the indictment, the district court held "that where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults, there is no valid governmental interest that I can see that would justify a criminal prosecution for distributing this material" [A. 13]. The ruling was primarily based on *Stanley*, the district court stating, "It would seem to me, anyway, that if a person has the right to receive and possess this material, then someone must have the right to deliver it to him" [A. 13]. The district court added: "In this situation here if the addressee is an adult, and this is what the person wants, I think that the cases I have cited and the principles that I have referred to certainly give him that right. That is his own personal decision." [A. 14].

Thereupon, the district court dismissed the indictment and held further that all the other pending motions would be deemed moot [A. 16-17]. This appeal followed [A. 17-18].

Summary of Argument.

1. The fundamental question presented is whether the district court correctly concluded, in the light of the developing constitutional standards enunciated by the Court in *Redrup*, *Stanley* and *Rowan*, that it is constitutionally impermissible to prohibit the mailing of explicit sexual materials to willing adult citizens desiring the material for their private consumption. The basic issue is whether the federal government has a compelling and necessary interest in prohibiting the mailing of explicit sexual materials to willing adults, when the material is not disseminated to minors nor disseminated in

such a manner as to intrude upon the sensibilities or privacy of the general public.

The determination depends not upon the history which preceded *Roth*, where the *Hicklin* rule dominated, but depends upon an analysis of *Roth* and the decisions which followed *Roth*. The post-*Roth* history demonstrates that obscenity is not, *per se*, outside the scope of constitutional protection and that the only compelling state interests in obscenity are the regulation of distribution to minors or obtrusive forcing upon unwilling recipients. Governmental intervention in the free flow of expression to adult citizens has been rejected as incompatible with the demands of the Constitution, not only by the courts, but by Congress as well.

2. It was recognized in Roth that sex was one of the vital problems of human interest and concern, and that the free speech and press guarantees embrace the liberty to discuss such problems. Ideas having even the slightest redeeming social importance were held in *Roth* to be entitled to the full protection of the guarantees of the Constitution. Hence, it was held vital that the standards for judging obscenity safeguard the protection of freedoms of speech and press for material which was not obscene.

The basic premise of *Roth* was that obscenity was not within the area of constitutionally protected speech because "utterly without redeeming social importance". Pointing to *Beauharnais* and *Chaplinsky*, the Court held that obscene utterances were not protected speech. Nevertheless, shortly after *Roth*, in a series of decisions, the Court emphasized that the holding in *Roth* did not recognize any state power to restrict the dissemination of material which was not obscene; that the

power to prevent the distribution of obscene matter did not mean "that there can be no constitutional barrier to any form of practical exercise of that power".

In *Jacobellis*, the Court, in reversing the conviction, stressed that freedom of expression for adults could not be totally suppressed in order to prevent the dissemination of material deemed harmful to children. It was suggested that laws aimed specifically at preventing distribution of objectionable material to children might reflect a legitimate state interest, but not laws which totally prohibited dissemination. Again, in *Ginzburg*, the Court suggested a second state interest which might justify a limitation on the dissemination of explicit sexual materials. If the conduct of the publisher was such as to obtrusively proclaim the obscenity of the material, then the publisher's own evaluation might be taken at its face value. Finally, in *Redrup*, a decade after the decision in *Roth*, the Court reversed all the judgments there involved and emphasized that in none of the cases was there a claim that the statute reflected "a specific and limited state concern for juveniles"; in none was there any suggestion of an "obtrusive assault upon individual privacy"; and in none was there evidence of the sort of "pandering" which the Court found significant in Ginzburg.

All of these developments followed *Roth*, and it should be noted that during this period the *Beauharnais* decision was undermined by the Court's decisions in *New York Times Co. v. Sullivan* and *Garrison v. Louisiana*. *Chaplinsky* has been limited to words which are likely to provoke the average person to retaliation and "thereby cause a breach of the peace". Even before *Stanley*, therefore, the "special logic" of *Chaplinsky* and *Beauharnais* was disappearing. Obscen-

ity had plainly come within the protection of the First Amendment in many contexts, and the limited countervailing state interests justifying regulation of obscenity had already been outlined by the Court.

3. The decision in *Stanley* specifically explicates the evolving standards. Georgia initially argued that under *Roth* obscenity was simply not constitutionally protected, and therefore the State was free to deal with obscenity in any manner. The Court replied that neither *Roth* nor any other decision of the Court reached that far. The assertion of a governmental interest in dealing with obscenity cannot in every context be insulated from all constitutional protections.

Georgia argued that obscenity is not an "essential part of any exposition of ideas". This had been the basic premise for excluding obscene utterances from the protection of the First Amendment guarantees. The Court, in *Stanley,* rejected this premise, declining to draw a line between the transmission of ideas and mere entertainment.

Georgia argued, in effect, that it had the right to control the moral content of a person's thoughts. The Court held that this assertion was wholly inconsistent with the philosophy of the First Amendment.

Georgia argued that it had a justifiable interest in preventing exposure to obscene materials which might lead to deviant sexual behavior or crimes of sexual violence. The Court replied that there was little empirical basis for that assertion, and that in any event, in the context of private consumption of ideas and information, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law.

Stanley, therefore, made clear that obscenity was not outside the scope of First Amendment protection; that the State was always required to demonstrate a compelling countervailing state interest to justify the regulation of obscenity; and that no such interest was discernible except the protection of minors and the forceable intrusion upon unwilling recipients.

4. The appellant concedes that if *Stanley* recognizes a constitutional "right to receive materials" which are "obscene", then under the decisions of the Court it is difficult for appellant to contend that there is no corresponding right of dissemination. The appellant's case, therefore, is premised on the notion that *Stanley* did not recognize the constitutional right of an adult to receive obscene materials. The argument of appellant, it is submitted, is clearly untenable.

In the first place, in *Stanley*, immediately after emphasizing that obscene utterances are entitled to constitutional protection, the court in its opinion referred three times to "the right to receive information and ideas". The specific citations of prior decisions of the Court were all directed to the right to receive literature and the right to distribute such literature. It is undisputed that the fundamental constitutional right upon which *Stanley* was based was the right of willing adults to receive information and entertainment for their own private consumption.

Moreover, when appellant argued before this Court in *Rowan*, appellant pointed to decisions like *Stanley* as emphasizing that freedoms of speech and press embrace the rights necessary to effectuate those freedoms, "including the right to circulate and receive publications". The *Rowan* decision itself rested on the

unfettered constitutional right of a citizen to receive materials for his private consumption.

Not only does the internal structure of the ruling in *Stanley* refute appellant's argument, but the legal commentators have been virtually unanimous in recognizing that elimination of adult censorship by *Stanley* has sound doctrinal support, is constitutionally required, and is socially desirable.

In addition, appellant appears to overlook the growing number of court decisions throughout the Nation that have interpreted *Stanley* as a First Amendment ruling, supporting the constitutional right of adults to receive alleged obscene materials and the corresponding right to disseminate such materials to adults for their private consumption.

5. The import of the decisions in *Redrup*, *Stanley* and *Rowan* is that an adult individual's right to receive materials of his own choice may only be abridged when there is a compelling and necessary interest which the State has a right to protect. The attempt by appellant to urge that there is a legitimate interest in establishing an official moral orthodoxy is incompatible with the Constitution. Even in the area of conduct, as distinguished from expression, there have been changing concepts with respect to sexual practices not involving force, adult corruption of minors, or public affront. It has been urged, in the light of changing social and cultural standards dealing with sex, that no harm to the secular interests of the community is involved in atypical sexual practice in private between consenting adult partners. Many court decisions reflect these changing concepts.

Moreover, the attempt by appellant to muster a legitimate countervailing state interest to justify prohibition of dissemination of obscene materials to willing adults is undermined by the Report of the Commission on Obscenity and Pornography which was submitted on September 30, 1970, after an extensive and detailed investigation of two years.

Finally, Congress has in recent legislation made provisions for the protection of legitimate federal interests and has specifically emphasized that adult citizens have the exclusive right to determine for themselves and for their children what they will or will not receive by way of explicit sexual materials.

In accordance with the basic principles of statutory interpretation, the district court construed the statute to avoid unconstitutionality where mailing solely to willing adults was involved. The statute was held to cover cases where dissemination is intended for minors or intended to intrude upon the sensibilities or privacy of the general public unwilling to receive such material. The indictment was dismissed by the district court because it failed to allege the essential elements of an offense which the statute could constitutionally reach. In the light of the government's stipulation, dismissal was required under the Constitution and the decisions of the Court.

ARGUMENT.

I.

The Question of Federal Power to Prohibit the Distribution of Obscene Materials to Willing Adults for Their Private Consumption Is Not Answered by Appellant's Resort to Pre-Roth Legal History When the Comstock Act Rested Upon the Hicklin Rule for Its Validity.

The appellant has chosen to commence its argument with a discussion of the "venerable line of authority" upon which the Court in *Roth v. United States,* 354 U.S. 476 allegedly relied. (Appellant's Br. 6-8). Appellee submits that appropriate discussions here should commence with an analysis of the decision by this Court in *Roth.* The history which preceded *Roth* cannot be, it is submitted, determinative of the constitutional questions presented on this appeal.

The provisions of the Comstock Act were derived from Lord Campbell's Act of 1857, with the *Hicklin* standard read into its provisions by the courts. See, Paul and Schwartz, Federal Censorship: Obscenity in the Mail (1961) 9-49. As early as 1913, however, Judge Learned Hand observed that a rule of law, consonant with "mid-Victorian morals", hardly afforded an answer for the American community in the early twentieth century. *United States v. Kennerley,* 209 Fed. 119 (D.C. N.Y.). When, in 1957, the Court announced in *Roth* that the *Hicklin* test must be rejected "as unconstitutionally restrictive of the freedoms of speech and press" (354 U.S. at 489), former precedents were clearly undermined. Indeed, in the very term when *Roth* was decided, the Court held that the free speech and press provisions of the First Amend-

ment, subsumed into the due process clause of the Fourteenth Amendment, invalidated a state statute which made it an offense to make available to the general reading public a book having an alleged deleterious influence on youth. *Butler v. Michigan,* 352 U.S. 380.

Moreover, the more recent enunciation of constitutional standards with respect to the sweep of First Amendment freedoms make resort to ancient history by appellant an untenable reed. The power of the State to prohibit the exercise of freedoms of speech and press can no longer be premised on a finding of "bad tendency"; First Amendment freedoms may ordinarily be prohibited only when "directed to inciting or producing imminent lawless action and is likely to incite or produce such action". *Brandenburg v. Ohio,* 395 U.S. 444, 447. See also, concurring opinions of Justice Black and Justice Douglas, 395 U.S. at 449-457. The usual presumption supporting legislation "is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment". *Thomas v. Collins,* 323 U.S. 516, 530. Only a compelling and necessary state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. *NAACP v. Button,* 371 U.S. 415, 438-445. The Court has held that no formula for the repression of expression, including "public morals", can claim talismanic immunity from constitutional limitations. *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684, 688-689. See, *Mounce v. United States,* 355 U.S. 180, *per curiam* opinion granting certiorari, and vacating judgment upon confession of error by the Solicitor General; *New York*

Times Co. v. Sullivan, 376 U.S. 254, 269. See also, dissenting opinion of Justice Harlan in *Roth*: "Congress has no substantive power over sexual morality". 354 U.S. at 504.

The broad arguments made by appellant fall short of meeting the specific issues presented here. It misses the mark to state that "obscene matter" has been banned from the mails for more than one hundred years (Appellant's Br. 6, fn. 3). The fact is that "matter" deemed obscene a century ago is now plainly entitled to constitutional protection and no longer subject to exclusion from the mails. See, the decisions following *Roth*, through *Jacobellis*, *Memoirs*, *Redrup*, and reversals of judgment based on *Redrup*. See, especially, *Sunshine Book Co. v. Summerfield*, 355 U.S. 372; *One, Inc. v. Olesen*, 355 U.S. 371; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Aday v. United States*, 388 U.S. 447. The question presented in this case is not whether the postal and commerce powers of Congress include the "power to prohibit the mailing of obscene matter" (Appellant's Br. 6), but whether it is constitutionally permissible for Congress to prohibit the use of the mails to adult citizens willing to receive explicit sexual materials for their private consumption. The specific question presented is whether there is a constitutional right to mail "obscene" material where the material is mailed only to willing adults, and is not designed or intended for minors nor obtrusively forced upon unwilling recipients. The issue is whether the elimination of adult censorship by the federal government is constitutionally required.[2]

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[2]Most of the cases cited by appellant (Appellant's Br. 6-7) do not reflect current judicial attitudes. *Public Clearing House v. Coyne* and *Donaldson v. Read Magazine* were based on the con-

In the discussion which follows, the appellee proposes to demonstrate that an examination of the principles enunciated by this Court, from *Roth* to *Redrup, Stanley* and *Rowan,* leads to the conclusion that obscenity is not, *per se,* outside the scope of constitutional protection; that the Court has, as early as *Jacobellis,* indicated that the only compelling state interests in obscenity may be the regulation of distribution to minors or obtrusive forcing upon unwilling recipients; and that governmental intervention in the free flow of expression to adult citizens is incompatible with the demands of the Constitution. It is also important to note, as appellee shows hereafter, that the developing constitutional standards enunciated by the Court are reflected, as well, in Congressional legislation. The law now sustains the right of an adult, on his own behalf and on behalf of his minor children, to refuse to receive explicit sexual materials. One who knowingly disregards

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cept that Congress, in establishing a Postal Service, may annex such conditions to it as it chooses. The cases also involved using the mails for executing fraudulent schemes. These cases did not involve safeguards required by the First Amendment to obviate the dangers of a censorship system. See, Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968); Justice Harlan in *Roth v. United States,* 354 U.S. 476, 504, fn. 5; Monaghan, First Amendment "Due Process", 83 Harv. L. Rev. at 518-519. The decisions in *Ex parte Jackson, Champion v. Ames* and *In re Rapier* involved the mailing of lottery circulars. *Hoke v. United States* involved interstate transportation of women for purposes of prostitution. *Heart of Atlanta Motel, Inc.,* was premised basically on "the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse". 379 U.S. at 257. None of these cases which preceded *Roth* are decisive on the issue here presented, the question of the constitutionality of the statute as construed and applied to the mailing of explicit sexual materials to willing adults. There are no "precedents" which bar determination of this question. See, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States, Constitution of the United States of America: Analysis and Interpretation, (Leg. Ref. Serv., Lib. of Cong. 1964).

such affirmative act of an unreceptive adult is subject to injunctive and contempt proceedings, and to criminal sanctions, but the adult in all cases remains "the exclusive and final judge" of what expression he will receive for his private consumption.

II.

The District Court Correctly Concluded That No Valid Governmental Interest Justifies a Criminal Prosecution for Distributing Obscene Material Solely to Willing Adults. The Conclusion Was Required in the Light of the Free Speech and Press, Due Process and Equal Protection Provisions of the Constitution and the Rulings of the Court in Redrup, Stanley and Rowan.

1. The first time the question of the relation between "obscenity" and the First Amendment was "squarely presented" was in *Roth v. United States,* 354 U.S. 476, 481. The Court stated that the portrayal of sex in art, literature and scientific works is not itself sufficient reason to deny material the constitutional protection of freedoms of speech and press. Sex was deemed to be "one of the vital problems of human interest and public concern", and the free speech and press guarantees of the Constitution were held to embrace the liberty to discuss such matters of public concern without previous restraint or fear of subsequent punishment. 354 U.S. at 487-488. The Court stated that all ideas having even the slightest redeeming social importance have the full protection of the guarantees of the Constitution, unless excludable because they encroached upon the limited area of more important in-

terests.[3] The Court emphasized that it was vital that the standards for judging obscenity "safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest". 354 U.S. at 488.

Pointing to the decisions in *Beauharnais* and *Chaplinsky*, the Court held that the prevention and punishment of obscene utterances did not raise any Constitutional problem. It was stated that obscenity was not within the area of constitutionally protected speech because "utterly without redeeming social importance". As against claims that obscenity statutes purported to punish sexual thoughts, not related to overt antisocial conduct which might be incited in the persons stimulated to such thoughts, the Court, pointing again to *Beauharnais*, rejected such claims of lack of proof of clear or present danger, upon the ground that obscenity was not protected speech. The standards for judging obscenity were held to be sufficiently certain to satisfy due process requirements.

Shortly after the rendition of the aforesaid ruling, the Court was moved to state: "But our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; . . . The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of

[3]These might include specific protection for minors, *Prince v. Massachusetts*, and "clear and present danger" of a substantive evil which the State had a right to prevent, *Schenck v. United States*. 354 U.S. at 484, fn. 14.

that power." *Smith v. California,* 361 U.S. 147, 152, 155. In *Marcus,* 367 U.S. 717 the Court held that every obscenity prosecution implicates First Amendment questions. In that case, the state statutory search and seizure procedures "lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled". 367 U.S. at 731. The Court reiterated that the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. In *Quantity of Copies of Books,* 378 U.S. 205 the Court emphasized that a State was not free to adopt whatever procedures it pleased for dealing with obscenity without regard to the possible consequences for constitutionally protected speech. ". . . there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." 378 U.S. at 213.

2. The vagueness and ambiguity of the standards enunciated by the Court for judging obscenity, and the difficulty of applying such uncertain standards in particular cases, led the Court in *Jacobellis,* 378 U.S. 184 to make the following observations: "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population. . . to reading only what is fit for children' . . . State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination." 378 U.S. at 195.

In *Ginzburg v. United States,* 383 U.S. 463, the Court suggested a second state interest which might justify a limitation on the dissemination of explicit sexual materials. If the conduct of the publisher was such as to obtrusively proclaim the obscenity of the material, then the publisher's own evaluation might be taken at its face value. While the judgment in *Ginzburg* was by a sharply divided Court, in the light of the particular facts, it did appear that the Court was suggesting a shift from a doubtful power to regulate content of utterances to an acceptable power to regulate obtrusive conduct.

In 1967, a decade after the decision in *Roth,* the Court in *Redrup,* 386 U.S. 767, after reciting the varied constitutional views of the members of the Court in the area of obscenity, reversed the judgments in the three cases before it made the following significant statement:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; cf. Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed. 2d 412. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 72 S. Ct. 813, 96 L.Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31." (386 U.S. at 769).

See, Teeter and Pember, The Retreat From Obscenity: *Redrup v. New York,* 21 Hastings L.J. 175 (1969).

It should also be noted, before turning to *Stanley,* that some of the peripheral premises upon which *Roth* was based were undermined by subsequent decisions of the Court. In *New York Times Co. v. Sullivan,* reliance by the State upon *Beauharnais* was held misplaced. ". . . Libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." 376 U.S. at 269. In *Bachellar v. Maryland,* 397 U.S. 564, the Court pointed out that *Chaplinsky* only involved a small class of "fighting words" which are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace". Citing the decisions in *Terminiello, Street v. New York,* and other like rulings, the Court emphasized that *Chaplinsky* could not be invoked to justify limitations on utterances which were merely deemed objectionable, offensive or disturbing. Even before *Stanley,* therefore, the "special logic" of *Chaplinsky* and *Beauharnais* was disappearing. See, Kalven, The New York Times Case: Note on "The Central Meaning of the First Amendment", 1964 S. Ct. Rev. 191, 218.

The fact is that before the ruling in *Stanley,* the Court had already indicated that obscenity could not be deemed outside the protection of the guarantees of the First Amendment in all contexts; that a legitimate governmental interest in dealing with obscenity was required to be shown; and that such compelling interest might exist only with respect to the dissemination of material to minors or to dissemination so obtrusive as to invade the privacy of the general public. See, *Grant &*

Wissman v. United States, 380 F. 2d 748 (9 Cir. 1967).

3. In *Stanley,* 394 U.S. 557 the initial argument made by the State was that under *Roth* obscenity is simply not constitutionally protected, and therefore the State was free to deal with obscenity in any manner. To this argument, the Court made the following reply: "Roth and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. *But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither Roth nor any other decision of this Court reaches that far.*" 394 U.S. at 563 (Emphasis added).

In short, neither *Roth* nor any other subsequent decision reach such an absolute and broad conclusion for which Georgia contended. In *Roth,* the Court had stated that " 'Ceaseless vigilance is the watchword to prevent . . . erosion [of First Amendment rights] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack to prevent encroachment upon more important interests' ". 394 U.S. at 563.

Georgia argued, again relying on *Roth,* that obscenity is not an "essential part of any exposition of ideas". This had been the basic premise for excluding obscene utterances from the protection of the First Amendment guarantees. The Court in *Stanley* made direct reply: "Nor is it relevant that obscene materials in general, or the particular films before the court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertain-

ment is much too elusive for this court to draw, if indeed such a line can be drawn at all." 394 U.S. at 566.

The State argued in *Stanley* that it had an interest in protecting the individual's mind from the effects of obscenity. The argument, in essence, amounted to an assertion by the State of the right to control the moral content of a person's thoughts. The Court replied that to control the moral contents of a person's thoughts may be a noble purpose to some, "but it is wholly inconsistent with the philosophy of the First Amendment." As in *Kingsley*, obscenity cannot be suppressed on ideological or theoligical grounds. The Constitution protects the right to receive information and ideas, "regardless of their social worth". 394 U.S. at 564, 565-566.

The State argued that it had a justifiable interest in preventing exposure to obscene materials which might lead to deviant sexual behavior or crimes of sexual violence. The Court replied that there appeared to be little empirical basis for that assertion.[4] "But more important, if the state is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that 'among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . .' ". 394 U.S. at 566-567.

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[4]"Extensive empirical investigation, both by the Commission and by others, provides no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms such as crime, delinquency, sexual or nonsexual deviancy or severe emotional disturbances." (The Report of the Commission on Obscenity and Pornography, September, 1970, United States Govt. Pr. Off. 52).

Stanley, therefore, was a logical outgrowth of the developing standards enunciated by the Court in the obscenity area. *Stanley* made clear that "obscenity" was not outside the scope of First Amendment protection; that obscenity could not be deemed to be utterly without redeeming social importance; that the government had no legitimate interest in controlling the moral content of thought; and that there was no evidence available to establish a causal relationship between obscenity and antisocial or criminal behavior. The only valid governmental interests in dealing with the problem of obscenity was the dissemination of explicit sexual materials to minors (*Ginsberg v. New York*, 390 U.S. 629), or dissemination in such a manner as to intrude upon the sensibilities or privacy of the general public (*Redrup v. New York*, 386 U.S. 767, 769).

Two further observations were made in *Stanley*. The first was that an "individual's right to read or observe what he pleases" is so fundamental that its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws". 394 U.S. at 568. The second observation was: "Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments." 394 U.S. at 568, fn. 11.

4. The argument of appellant is that the district court erred "as to the impact of *Stanley*". (Appellant's Br. 8-11). In the government's view, *Stanley* merely protected an individual from interference with his privacy. The appellant does not detail supporting argument for this conclusion, but points to its Brief as Amicus Curiae in *Byrne v. Karalexis*, No. 83, this Term, pp. 6-18. The argument which follows, therefore, is

principally an answer to the arguments made in the aforesaid amicus curiae brief.

The appellant states in the *Byrne v. Karalexis* amicus brief (p. 12):

> ". . . It is undisputed that the crucial issue here revolves about the lower court's initial legal premise that *Stanley* recognizes a constitutional 'right to receive' materials which are 'obscene' in the sense defined by *Roth* and this Court's subsequent decisions following *Roth* . . . If there is a right, as such, it is then difficult to contend, under this Court's cases, that there is no corresponding right of dissemination, at least under some circumstances."

Appellant insists, however, that Stanley recognized no constitutional "right to receive" obscene materials; and that despite *Stanley*, the dissemination of explicit sexual materials to willing adults for their private consumption is without First Amendment protection.

With all deference, an analysis of the internal structure of *Stanley* would appear to lead to a conclusion opposite to that contended for by appellant. After the initial observation by the Court that the assertion of governmental interest in dealing with the problem of obscenity cannot, in every context, be insulated from all constitutional protections, the opinion immediately discussed the constitutional protection for "the right to receive information and ideas". 394 U.S. at 564. Twice thereafter, the Court repeated that freedom of speech and press "necessarily protects the right to receive", and that "this right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society". 394 U.S. at 564. This

was the fundamental constitutional right involved in *Stanley*, and insofar as the particular facts in *Stanley* were involved, that right took on an "added" dimension. 394 U.S. at 564.

The cases cited in the *Stanley* opinion on the issue of the right to receive emphasize the fundamental freedom involved. Thus, *Martin v. City of Struthers*, 319 U.S. 141 states that freedom of speech and press "embraces the right to distribute literature . . . and necessarily protects the right to receive it". 319 U.S. at 143. In *Griswold v. Connecticut*, 381 U.S. 479 the Court stated, "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read". 381 U.S. at 482. In *Lamont v. Postmaster General*, 381 U.S. 301 it was stated that the protection of the Bill of Rights goes beyond the specific guarrantees to protect from Congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful. "I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. at 308.

These were the particular cases cited in *Stanley*, and it is therefore fair to say, it is submitted, that the fundamental constitutional right upon which *Stanley* was based was the right of willing adults to receive information and entertainment for their own private consumption. The government concedes that under such circumstances there is bound to be a corresponding right of dissemination. It is simply unacceptable to

assert that the exercise of a First Amendment right to receive is limited to "bootlegging" of expression. In *Griswold*, the parties involved in the action were the Executive Director of the Planned Parenthood League and a licensed physician who served as Medical Director for the League. Such persons had standing to raise the constitutional rights of the married people, because otherwise "the rights of husband and wife, pressed here, are likely to be diluted or adversely affected". 381 U.S. at 481. In *Martin v. City of Struthers*, emphasis was placed on the constitutional right to distribute, as well as the right of citizens to receive the material. See also, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64, fn. 6.

Moreover, when appellant was arguing before this Court in *Rowan v. United States Post Office Department*, 397 U.S. 728, its views with respect to the impact of *Stanley* were quite different from the ones espoused here. In discussing the power of Congress to enact Title 39 U.S.C. §4009 and the right of a citizen to refuse matters he did not wish delivered to his home, as against the First Amendment interest of a sender, the government stated:

> "In making the assessment, Congress was of course aware that the freedoms of speech and press embrace the rights necessary to effectuate those freedoms, including the right to circulate and receive publications, the right to listen and the right to read. *Stanley v. Georgia*, 394 U.S. 557, 564; *Martin v. City of Struthers*, 319 U.S. 141, 143; *Ex parte Jackson*, 96 U.S. 727, 733; *Lamont v. Postmaster General*, 381 U.S. 301, 308 (Brennan, J., concurring)." (Brief for the Respondents, p. 31).

See also, the same Brief, pp. 35-37.

The decision of the Court in *Rowan* largely rested on the unfettered constitutional right of a citizen to receive materials for his private consumption. The validity of Title 39 U.S.C. §4009 was upheld because "the judgment of what constitutes an offensive invasion" of his interest in privacy rested "in the hands of the addressee". The statute made "the householder the exclusive and final judge of what will cross his threshold". The "mailer's right to communicate" stops only at the mailbox of an "unreceptive" addressee.

Both *Stanley* and *Rowan*, therefore, it is submitted, recognize that a necessary safeguard for the protection of freedoms of speech and press for adults is the right to distribute as well as to receive materials for private consumption. Appellant's insistence that the Court made only a "passing reference" to the right to receive information and ideas in *Stanley* (*Karalexis* Amicus Brief, p. 9), is a plain attempt to avoid the necessary concession which appellant is compelled to make if *Stanley* recognizes a constitutional right of an adult to receive obscene materials.

The appellant stresses a distinction between a "right to receive" and a disability to search and seize, a distinction which appellant says "may appear subtle", but is of "crucial importance" (*Karalexis* Amicus Curiae Brief, p. 12). However, it is clear that the Court in *Stanley* made its decision upon First Amendment grounds and not upon Fourth Amendment grounds. Contrary to the appellant's reluctance to accept the implications which flow from the Court's ruling, the legal writers have been virtually unanimous in recognizing that the elimination of adult censorship by *Stanley* has sound doctrinal support; is constitutionally required;

and is socially desirable. The consensus is that *Stanley* has correctly focused the interest of the State upon minors and unwilling adults. Note, The Supreme Court, 1968 Term, 83 Harv. L. Rev. 62, 151-152 ("The 'right to receive information and ideas, regardless of their social worth', should serve after *Stanley* to protect certain forms of public distribution as well as private possession. Surely that right may be effectively denied through a ban on all distribution of obscene material . . . 'Public distribution' may be defined narrowly to denote those forms of distribution or displays which thrust obscenity on unwilling individuals."); Laughlin, A Requiem for Requiems: The Supreme Court at the Bar of Reality, 68 Mich. L. Rev. 1389, 1403 (1970) ("*Stanley v. Georgia* has not been a particularly controversial opinion. Despite the reputed conservative backlash, even spokesmen for 'decent literature' groups no longer stress the issue of adult censorship; rather, the debate today focuses principally on minors."); Engdahl, Requiem for Roth: Obscenity Doctrine is Changing, 68 Mich. L. Rev. 185, 201 (1969) ("The fundamental holding of the *Roth* case—that obscenity is a discrete class of expression excluded from the constitutional protection guaranteed to other kinds of expression and therefore to be treated differently from other kinds of expression—has already met its demise."); Note, First Amendment: The New Metaphysics of the Law of Obscenity, 57 Cal. L. Rev. 1257, 1277 (1969) ("It follows, therefore, that only statutes carefully drafted to protect children and to prevent affronts to the public can withstand the constitutional test."); *Ratner, The Social Importance of Prurient Interest—Obscenity Regulation v. Thought-Privacy,* 42 So. Calif. L. Rev. 587, 596 (1969) ("Perceiving 'little empirical

basis' for a correlation between exposure to obscenity and antisocial behavior the Supreme Court, in *Stanley*, designated 'education and punishment for violation of law' as less intrusive and no less effective deterrents than a reading ban."); Note, Obscenity: A Return to the First Amendment?, 49 Neb. L. Rev. 660, 668 (1970) ("It would seem that obscenity has been recognized as within the general principle of the First Amendment, and that of the historical and traditional state interests which have been advanced to legitimize repression of obscenity, only obtrusiveness remains tenable after *Stanley*."); Karre, *Stanley v. Georgia:* New Directions in Obscenity Regulation?, 48 Tex. L. Rev. 646, 650 (1970) ("In giving any First Amendment protection to material assumed obscene, the Court has repudiated the major premise of the two-level theory: that sexual material meeting the obscenity definition is wholly excluded from the First Amendment."). See also, Morreale, Obscenity: An Analysis and Statutory Proposal, 1969 Wis. L. Rev. 421-468; Katz, Free Discussion v. Final Decision: Moral and Artistic Controversy and the Tropic of Cancer Trials, 79 Yale L. J. 209-252 (1969).

In addition to all of the aforesaid, the appellant appears to overlook the number of courts that have interpreted *Stanley* as a First Amendment ruling, supporting the constitutional right of adults to receive alleged obscene materials and the corresponding right to disseminate such materials to willing adults for their private consumption.

In *Stein v. Batchelor,* 300 F. Supp. 602 (D.C. Tex. 1969), appeal pending, District Judge Hughes, writing for a unanimous three-judge court, stated: "It is impossible, however, for this Court to ignore the broader

implication of the [Stanley] opinion . . . in some contexts obscenity is afforded First Amendment protection and thus cannot constitutionally be regulated in the absence of a legitimate countervailing societal interest . . . In the context of 'private' expression there is unlikely to be any legitimate state interest justifying regulation (with the possible exception of the State's interest in protecting children)." 300 F. Supp. at 606-607.

In *Karalexis v. Byrne,* 306 F. Supp. 1363 (D.C. Mass. 1969), appeal pending, Circuit Judge Aldrich, writing for himself and District Judge Pettine, stated: "It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier. A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it." 306 F. Supp. at 1366-1367.

In *United States v. Thirty-Seven (37) Photographs,* 309 F. Supp. 36 (D.C. Cal. 1970), appeal pending, District Judge Ferguson, writing for a unanimous three-judge court, stated: "As stated in Stanley, the right to read necessarily protects the right to receive . . . If the statute can violate the freedom of speech and press, then it is invalid. This it clearly does. It prohibits a person who may constitutionally view pictures of the right to receive them." 309 F. Supp. at 37-38.

In *United States v. Lethe,* 312 F. Supp. 421 (D.C. Cal. 1970), Chief Judge MacBride, in holding that the government could not constitutionally bring on a prosecution under Title 18 U.S.C. §1461 for mailing obscene material to an adult who requests it, stated: "If the

government has no substantial interest in preventing a citizen from reading books and watching films in the privacy of his home, then clearly it can have no greater interest in preventing or prohibiting him from acquiring them . . . There is no public display and children are not involved. No valid governmental interest remains, and the conclusion is inescapable that the government cannot constitutionally bring such a prosecution." 312 F. Supp. at 424-425.

In *United States v. Langford*, 315 F. Supp. 472 (D.C. Minn. 1970), District Judge Neville reduced the sentence of a defendant, who had pleaded guilty to an indictment under Title 18 U.S.C. §1461, to the time served, upon the ground that the defendant's conduct was not an offense under *Stanley* since the material was not distributed to juveniles or unwilling persons, or obtrusively forced upon unwilling persons. The court stated: "Accepting the major premise in Stanley v. Georgia as the law, the logic of the *Lethe* case and the result it reaches seem unassailable . . . Defendant was not guilty. He did not mail nor send to a juvenile, he did not coerce an unwilling individual, nor did he 'pander'." 315 F. Supp. at 473.

On August 21, 1970, a decision was rendered by District Judge Larson, a United States District Judge for the District of Minnesota, in a case entitled *Sexual Freedom in Denmark, et al. v. Vavreck, et al.*, No. 4-70-Civil 273, unreported. A copy of the opinion is attached hereto as Appendix A, and a copy of the order based upon said opinion is attached hereto as Appendix B. In granting an order enjoining officials from repeated seizures of the film, the court held that obscenity must now be deemed to be within the protection of the First Amendment, in the light of *Stanley*. The court

stated: "It would be absurd to make legal the possession of materials which could only be purchased illegally . . . The Supreme Court decision in Stanley raises the distinct possibility that distribution of obscene matter may be protected by the First Amendment to the Constitution of the United States. Although the community has obvious and legitimate interests, it appears that they can be well and adequately protected without a complete prohibition on exhibition."

On October 28, 1970, District Judge Gordon, a Judge of the United States District Court for the Eastern District of Wisconsin, in a case entitled *United States v. Orito,* No. 70-Cr.-20, unreported, granted a motion to dismiss an indictment brought under Title 18 U.S.C. §1462 on the ground that the statute was overbroad and violated the First and Ninth Amendments. A copy of the opinion is attached hereto as Appendix C. The court decided that under *Stanley* and *Redrup* the statute was unconstitutional because it proscribed "all transportation of obscene materials without discriminating as to whether such materials are 'pandered', exposed to children or imposed on unwilling adults."

On November 19, 1970, District Judge Goodwin, speaking for a unanimous three-judge court in a case entitled *Hayse, et al. v. Hoomissen, et. al.,* Civ. No. 69-743 (D.C. Ore.), unreported, held that the state obscenity statute was overbroad and offended the constitutional guarantees under *Stanley*. A copy of the opinion and judgment is attached hereto as Appendix D. "The *Stanley* decision adopts for obscenity the traditional balancing-of-interests approach familiar to the free-speech cases . . . The circumstances in which obscenity is distributed and circulated now determine wheth-

er it is protected or unprotected by the First Amendment."

On November 24, 1970, District Judge Doyle, a Judge of the District Court for the Western District of Wisconsin, in a case entitled *United States v. B & H Dist. Corp., et al.*, 70-Cr.-67, unreported, held that an indictment brought under Title 18 U.S.C. §1462 must be dismissed upon the ground that the statute was overbroad under the First Amendment, in the light of *Stanley*. A copy of the opinion is attached hereto as Appendix E. The district court stated: "Recognizing that the First Amendment protects the individual's right to receive obscene materials for such uses, I believe that the dissemination of obscene matter through interstate transportation, in a manner which itself neither exposes children to obscenity nor assaults the sensibility of an unwilling adult public, cannot be less protected. The government cannot indirectly prevent an individual from receiving obscene matter for permissible uses by making it a crime to disseminate or transport the materials to him."

5. It is submitted that the import of the decisions in *Redrup, Stanley* and *Rowan* is that an adult individual's right to receive materials of his own choice may only be abridged when there is a compelling and necessary interest which the State has a right to protect. The *Roth* ruling remains viable with respect to obtrusive forcing upon unwilling adults and with respect to minors as in *Ginsberg*. The attempt of the government to urge that there may be a "legitimate interest in the morality of the public at large" (*Byrne v. Karalexis* Amicus Brief, p. 17), ignores the fact that an attempt to establish an official moral orthodoxy is incompatible with the Constitution. "If there is any

fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642.

In this connection it should be noted that even in the area of conduct, as distinguished from expression, there have been changing concepts with respect to sexual practices not involving force, adult corruption of minors or public affront. It has been urged, in the light of changing social and cultural standards dealing with sex, that no harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. American Law Institute, Model Penal Code, Tentative Draft No. 4 (1955), pp. 276-291. The premise underlying this position is that it is not a proper function of the criminal law to regulate private morality. Israel, "The Process of Penal Law Reform—A Look at the Proposed Michigan Revised Criminal Code", in 14 Wayne L. Rev. 722, 948-957 (1968). See also, Ill. Ann. Stat. ch. 38, Sections 11-1 to 11-20 (Smith-Hurd 1964); Note, "The Proposed Law of New York", 64 Colum. L.Rev. 1469, 1545 (1964).

Many courts have rejected the notion that the enforcement of morality without demonstrable individual harm, at the expense of liberty, is worth the price. It has been suggested that punitive measures under such circumstances may constitute cruel and unusual punishment, in violation of the prohibitions of the Eighth Amendment. The right to "liberty" in matters related to marriage, family and sex has been frequently acknowledged. See *Griswold v. Connecticut,* 381 U.S.

479; *Loving v. Virginia,* 388 U.S. 1; *Norton v. Macy,* 417 F.2d 1161 (D.C. Cir. 1969); *People v. Belous,* 71 A.C. 996, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969); *Morrison v. State Board of Education,* 1 Cal. 3d 214, 461 P. 2d 375, 2 Cal. Rptr. 175 (1969).[5]

Moreover, the attempt by appellant to muster a legitimate countervailing state interest to justify prohibitions on dissemination of obscene materials to willing adults is undermined by the Report of the Commission on Obscenity and Pornography which was submitted in September, 1970, after an extensive and detailed investigation of two years. Some of the conclusions drawn by the Commission are as follows: (1) "Extensive empirical investigation, both by the Commission and by the others, provides no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms such as crime, delinquency, sexual or nonsexual deviancy or severe emotional disturbances"; (2) "On the positive side, explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. At times, these materials also appear to serve to increase and facilitate construc-

[5]"The concern about the effect of obscenity upon morality is also expressed as a concern about the impact of sexual materials upon American values and standards. Such values and standards are currently in a process of complex change, in both sexual and non-sexual areas. The open availability of increasingly explicit sexual materials is only one of these changes. The current flux in sexual values is related to a number of powerful influences, among which are the ready availability of effective methods of contraception, changes of the role of women in our society, and the increased education and mobility of our citizens. The availability of explicit sexual materials is, the Commission believes, not one of the important influences on sexual morality." (The Report of the Commission on Obscenity and Pornography, September, 1970, United States Govt. Pr. Off. 54-55).

tive communication about sexual matters within marriage"; (3) "Society's attempts to legislate for adults in the area of obscenity have not been successful. Present laws prohibiting the consensual sale or distribution of explicit sexual materials to adults are extremely unsatisfactory in their practical application"; (4) "Public opinion in America does not support the imposition of legal prohibitions upon the right of adults to read or see explicit sexual materials. While a minority of Americans favors such prohibitions, a majority of the American people presently are of the view that adults should be legally able to read or see explicit sexual materials if they wish to do so";(5) "The lack of consensus among Americans concerning whether explicit sexual materials should be available to adults in our society, and the significant number of adults who wish to have access to such materials, pose serious problems regarding the enforcement of legal prohibitions upon adults, even aside from the vagueness and subjectivity of present law."; (6) "The foregoing considerations take on added significance because of the fact that adult obscenity laws deal in the realm of speech and communication. Americans deeply value the right of each individual to determine for himself what books he wishes to read and what pictures or films he wishes to see"; (7) "The Commission carefully considered the view that adult legislation should be retained in order to aid in the protection of young persons from exposure to explicit sexual materials. We do not believe that the objective of protecting youth may justifiably be achieved at the expense of denying adults materials of their choice. It seems to us wholly inappropriate to adjust the level of adult communication to that considered suitable for children"; (8)

"There is no reason to suppose that elimination of governmental prohibitions upon the sexual materials which may be made available to adults would adversely affect the availability to the public of other books, magazines, and films. At the present time, a large range of very explicit textual and pictorial materials are available to adults without legal restrictions in many areas of the country"; (9) "The Commission is of the view that it is exceedingly unwise for government to attempt to legislate individual moral values and standards independent of behavior, especially by restrictions upon consensual communication. This is certainly true in the absence of a clear public mandate to do so, and our studies have revealed no such mandate in the area of obscenity".

Finally, Congress has in recent legislation made provisions for the protection of legitimate federal interests and has specifically emphasized that adult citizens have the exclusive right to determine for themselves what they will or will not receive by way of explicit sexual materials. The congressional policy was noted by this Court in *Rowan*. The Postal Reorganization Act (Public Law 91-375, 84 Stat. 719) which revised Title 39 of the United States Code was approved August 12, 1970. Former 39 U.S.C. 4009 has been renumbered 39 U.S.C. 3008. This statute empowers the Post Office Department to assist postal patrons who do not wish to receive "pandering advertisements". An addressee may send a notice to that effect to the Postmaster General who issues a prohibitory order to the sender. Upon request of any addressee the prohibitory order of the Postmaster General must include the names of any of the addressee's minor children who are under the age of 19. A violation of the prohibitory order may result in injunctive and contempt proceedings.

Under the Postal Reorganization Act there now are additional provisions. 39 U.S.C. 3010-3011. These new provisions make it unnecessary for a postal patron to receive one mailing before invoking the Act, and under the new law all mailers will be prevented from sending unsolicited mail to an objecting recipient, whether or not a prohibitory order was previously received. In short, any person on his own behalf or on the behalf of any of his children who has not attained the age of 19 years and who resides with him, may file with the postal service a statement that he desires to receive no sexually oriented advertisements through the mail. The postal service will maintain a list and make it available. No person can mail to any individual whose name and address has been on the list for more than 30 days. Injunctive and contempt proceedings are provided for violations. The Postal Reorganization Act by the provisions of Sections 1735-1737 imposes criminal sanctions for violations of 39 U.S.C. 3008 or 3010.

6. In the light of all of the foregoing, it is submitted that the mere distribution of allegedly obscene books to willing adult recipients, without intent to distribute the material to minors or to distribute the material in such a manner as to intrude upon the sensibilities or privacy of the general public, is not constitutionally punishable. The District Court below was correct, it is submitted, in holding in effect that if the federal statute is construed more broadly the statute would violate the free speech and press and due process provisions of the First Amendment. In accordance with basic principles of statutory interpretation, the District Court construed the statute to avoid unconstitutionality by limiting the reach of the statute to only

those cases where dissemination is intended for minors, or intended to intrude upon the sensibilities or privacy of the general public unwilling to receive such material. The indictment was dismissed by the District Court because it failed to allege the essential elements of the only offense which the statute could constitutionally reach. In the light of the government's stipulation dismissal was required under the Constitution and *Redrup, Stanley* and *Rowan*. See also *Russell v. United States*, 369 U.S. 749; *United States v. Robel*, 389 U.S. 258.

Conclusion.

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Appellee.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Opinion of District Judge Larson.

Memorandum.

United States District Court, District of Minnesota, Fourth Division.

Sexual Freedom in Denmark (Dansk Sexualitet), a Motion Picture Film; Art Films International, Inc., a California Corporation; Michael Kubick, Grace Conoway, and Patrick Phillippe, Plaintiffs, vs. Edward Vavreck, individually and in his capacity as Assistant City Attorney for the City of Minneapolis; Keith M. Stidd, individually and in his capacity as City Attorney for the City of Minneapolis; Basil Lutz, individually, and in his capacity as Chief of Police of the City of Minneapolis; Jon Prentice, individually and in his capacity as Supervisor of the Morals Squad of the City of Minneapolis Police Department; and Donald Omodt, individually, and in his capacity as Sheriff of Hennepin County, Defendants. No. 4-70-Civil 273.

Filed Aug. 24, 1970.

Frank A. Massey, Clerk.

By Eleanor Mollner

Deputy

On June 19, 1970, Edward C. Vavreck of the City Attorney's office obtained from the Honorable Donald S. Burris, Judge of Hennepin County Municipal Court, an Order to appear and show cause why the film *Sexual Freedom in Denmark* should not be shown. Pursuant to that Order a hearing was held on June 24 and 25, 1970, before the Honorable A. Paul Lommen, at which time the motion picture and the City were both represented by counsel. Pursuant to an Order is-

sued by Judge Lommen at the conclusion of the hearing the Minneapolis Police Department obtained a search warrant for purposes of seizing a copy of the film. The warrant was dated June 29, 1970.

A copy of the film was surrendered to the Clerk of Hennepin County Municipal Court on July 1, 1970. Nevertheless, on July 2, the Minneapolis Police Department entered the premises at which the plaintiff film was being shown and seized a second copy of the film, using the warrant as authorization. On July 6 Judge Lommen ordered the return of the second copy of the film.

Defendants maintain that they have acted pursuant to a Minneapolis ordinance dealing with obscenity. The injunction does not interfere with any statewide scheme of enforcement.

On July 27, 1970, the plaintiffs brought before the Court a motion seeking a preliminary injunction as follows:

I.

Directing defendants to return to plaintiffs the first copy of *Sexual Freedom in Denmark* seized July 1, 1970, at the Empress Theatre, 412 West Broadway, Minneapolis, Minnesota. (This refers to the copy voluntarily surrendered to the Clerk of Hennepin County Municipal Court.)

II.

Directing defendants to return to plaintiffs the second copy of *Sexual Freedom in Denmark,* seized July 2, 1970, at the Empress Theatre.

III.

Enjoining the defendants from seizing or threatening to seize the plaintiff film *Sexual Freedom in Denmark.*

IV.

Enjoining the defendants, and each of them, their assistants, agents, successors, and all persons acting in concert with them or under their direction from disposing of, transferring or making any use of the film *Sexual Freedom in Denmark* or any derivative evidence received therefrom until a final determination is made by this Court.

V.

Enjoining the defendants, and each of them, their assistants, agents, successors, and all persons acting in concert with them or under their direction from arresting or threatening to arrest plaintiffs or any person connected with the exhibition or distribution of plaintiff film *Sexual Freedom in Denmark* until a final determination is made by this Court.

VI.

Enjoining the defendants, and each of them, their assistants, agents, successors, and all persons acting in concert with them or under their direction from trespassing on the premises where the film is being shown or from making any use of derivative evidence derived therefrom until a final determination is made by this Court.

INJUNCTIVE RELIEF

Criminal proceedings have been commenced in Hennepin County Municipal Court which may ultimately result in a determination of the obscenity of the plaintiff film. The "comity" doctrine generally proscribes interference by the Federal Courts with State Court criminal proceedings. However, where there is a probability that First Amendment constitutional rights have been or are being violated, exceptions are made to the

"comity" doctrine because of the preferred position of First Amendment guarantees. It has been clearly established that movies are a form of expression protected by the First Amendment and hence the distribution of movies is correlatively protected by the First Amendment.

Until recently it had been believed that *Roth v. United States,* 354 U.S. 476 (1957), placed obscene materials outside the protection of the First Amendment. Thus, there was no protection for expression which was manifested in any form of pornography. Under such a doctrine, the disposition of the case before this Court would have turned on the issue of obscenity.

The existence of First Amendment rights to be protected in a case such as the one before the Court would hinge upon whether or not the movie was obscene as a matter of law. Thus the Court in evaluating the likelihood that First Amendment rights were being violated would have to consider the likelihood that the film's content was obscene. The higher the probability of obscenity the less likely and immediate the probability that there are any First Amendment rights to be protected.

This inverse relationship also affects the preconditions to injunctive relief. Whatever irreparable injury or loss plaintiffs sustain arises largely out of the violation of their First Amendment rights. Thus under the *Roth* formulation the greater the likelihood of obscenity the less likely the violation of First Amendment rights and correspondingly the less immediate the likelihood of irreparable injury or loss to the plaintiffs.

Counterposed against these uncertain interests of the plaintiffs would be the community interest in prevent-

ing what might be continuing criminal activity and its desire to prevent the exposure of its citizens to obscene movies. Again the existence and immediacy of the interest would hinge largely upon the probability of obscenity.

It is apparent from the foregoing that the relative weights of all these interests would be determined by the probability that the movie was indeed pronographic. The more likely it was that the movie was obscene, the greater the probability that the community was exercising a legitimate interest. Correspondingly, the likelihood that any First Amendment rights were being violated became less immediate. The possibility of irreparable injury and loss flowing from the violation of a First Amendment right would diminish in proportion to the immediacy of the right violation.

In such a situation a determination, after an adversary hearing, that there was a sufficient likelihood of obscenity to support a search warrant would be of substantial importance in determining the weight to be given the factors considered in the judicial balancing process.

This state of affairs was abruptly changed by the United States Supreme Court in *Stanley v. Georgia,* 394 U.S. 557 (1969). The police while conducting a search for bookmaking equipment came across some "stag" films in a dresser drawer. Upon determining that Mr. Stanley occupied the room in which the films were located, they promptly charged him with possession of obscene movies. The Supreme Court reversed the conviction, ruling that Stanley's right to possession of the movies was protected by the First Amendment *regardless of whether the movies were obscene or not.* Thus

the contention that pornography is completely outside the protection of the First Amendment is no longer tenable.

The effect upon the instant case is a substantial one, for the question is no longer the likelihood that the plaintiff motion picture is obscene. The likelihood of a First Amendment right being violated is no longer geared to the probability of obscenity, nor is the immediacy of the State interest or the relationship between the two competing interests.

This Court, rather than being faced with an uncertain First Amendment right, the existence of which is to be determined by the outcome of the obscenity litigation, is presented with a First Amendment right which is in no way affected by the eventual outcome of the litigation. Under the former state of affairs it was possible to reason that if the existence of injury to plaintiffs arising out of the deprivation of First Amendment rights turns upon the absence of obscenity, and there is to the contrary a substantial chance that the material is indeed obscene, then it is justifiable to defer to the State interest which by definition would be more immediate and likely to be legitimate.

After *Stanley*, however, such reasoning is completely inapposite. The existence of First Amendment protection is not solely dependent upon the issue of obscenity nor does the balance between the plaintiffs' and defendants' interest hinge upon the issue of obscenity. Thus it is not necessary for this Court to face the issue of obscenity. For purposes of the following discussion we shall assume without deciding that *Sexual Freedom in Denmark* is in fact obscene. The question is now, what is the likelihood that distribution of *Sexual Freedom in Denmark* is protected after *Stanley*.

Since the Supreme Court has extended constitutional protection to possession of pornography, one would be naive to assume that distribution would not be likewise protected at least to a limited extent; a right to possession implies a correlative right to receive. It would be absurd to make legal the possession of materials which could only be purchased illegally. The question therefore is not whether but to what extent is distribution to be protected.

It is clear that at a bare minimum a private sale between two parties would have to be permitted. However, an examination of the realities surrounding the production and distribution of any product compels us to realize the fact that if each private sale is traced back in time that there will be an ultimate retail vendor. To permit private sales but to make unlawful the original sale at a retail outlet would again raise the absured inconsistence previously alluded to.

There is an added consideration when dealing with distribution of movies that does not arise in the context of books and still pictures. It takes special and relatively expensive equipment to view a motion picture. As a result the cost of equipment, coupled with the expense of moving pictures relative to the cost of books and still pictures, places access to motion pictures beyond the means of many. Naturally, entrepreneurial types seized upon this disability. They conveniently provided to their customers at a greater than usual charge a projector and screen as well as a place to sit and an opportunity to purchase refreshments to enhance viewing enjoyment. Thus we are one step beyond mere sale of a movie; there is now sale plus exhibition.

It is tempting for this Court to dispose of the case on these grounds. A closer analysis, however, creates the realization that this is not possible. Substantively the exhibition of a motion picture is no different than the sale of a book or still pictures. The fact that one needs a projector to view a movie is merely a disability peculiar to moving pictures which is not experienced by books and still pictures. A book on display can be picked up in the store, thumbed through, perused, etc. It is the same case for pictures. This is not true for moving pictures. The exhibition of movies for a fee simply makes movies as accessible as books.

I think most persons will concede that whatever evil flows from the exhibition of a pornographic movie flows equally from the sale of a pornographic book. It is no more difficult to control access to a movie theater than it is to a bookstore, nor to control the advertising techniques of one than the other or to whom each one distributes its respective product. Thus it appears that the exhibition of a movie is no more (nor less) onerous than the sale of magazines or pictures.

Until this time reference has been made almost solely to the First Amendment rights of those who distribute or desire to view a motion picture such as *Sexual Freedom in Denmark*. There are community interests which have to be considered also, which include the right of a State or municipality to exercise its police power and the rights of those citizens who do not want to be exposed to pornographic material.

The City of Minneapolis certainly has an interest in regulating the distribution of pornographic materials. Three bases have traditionally been advanced to support this interest: the assertion that exposure to such

materials causes sexually deviant behavior or crimes of sexual violence, the fear that such materials might fall into the hands of minors, and the protection of that majority segment of the community which has no desire to be exposed to such materials.

The Supreme Court in *Stanley* indicated that there was no empirical basis for the assertion that exposure to pornography resulted in deviant behavior and that "Given the present state of knowledge, the state may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." 394 U.S. at 567.

Since *Stanley* was decided, a Government study has revealed that the empirical evidence available tends to refute any relationship between antisocial behavior and pornography.

The Court in *Stanley* was concededly directing itself to mere possession and felt that the right of the individual to possess and view in privacy the films outweighed the right of the State to outlaw mere possession. In light of this, an argument can be made that while the possible danger of pornography causing deviant behavior did not outweigh the right to mere possession, it does outweigh any correlative right to distribution. However, in light of the relationship of distribution to possession and the empirical evidence which has become available, this Court feels obligated to reject a contention such as this. The other two considerations appear to be valid and very real ones. However, they can be sufficiently protected without a total prohibition on distribution.

Children can be insulated from the movie in much the same manner as they are from books and photographs. Criminal penalties can be imposed on the exhibitor if he permits children on the premises or exhibits films to them, just as is done with books or photographs or, for that matter, intoxicating beverages. Likewise, to protect the unwilling viewer, limitations can be placed upon the places at which the film may be exhibited or the manner in which it may be promoted. Obviously it would be appropriate to make impermissible the showing of the film at a drive-in movie. Restrictions on the mode of advertising or a prohibition against pandering, such as was present in *Ginsberg v. New York*, 390 U.S. 629 (1968), should similarly discourage offensive exploitation of the film contents. These latter restrictions would also satisfactorily protect the privacy of the members of the community who have no desire to be exposed to such matter.

CONCLUSION

The Supreme Court decision in *Stanley* raises the distinct possibility that distribution of obscene matter may be protected by the First Amendment of the Constitution of the United States. Although the community has obvious and legitimate interests, it appears that they can be well and adequately protected without a complete prohibition on exhibition. Hence the Court feels compelled in the light of these factors to strike the balance in favor of the First Amendment right to protect that right by appropriate injunctive relief.

Obviously when there is a judicial determination of the extent to which the *Stanley* doctrine protects distribution of matter such as this, at least insofar as Minnesota is concerned, such findings may compel the

dissolution of all or part of the injunctive relief granted by this Court or may render further injunctive relief unnecessary. In that case or in the event that any other relevant factors come to light, it goes without saying that a petition can be made to this Court for appropriate modification of the Order.

There is presently a criminal action arising out of the exhibition of *Sexual Freedom in Denmark* pending in Hennepin County Municipal Court. In order to effectively prosecute this action the City Attorney needs a copy of the film *Sexual Freedom in Denmark* for evidentiary purposes. Although this Court feels compelled to protect the constitutional rights of plaintiffs, it does not feel at all required to interfere with existing criminal proceedings. Therefore parts I and IV of the plaintiffs' motion are denied and the copy of the film originally surrendered by the plaintiffs will remain in possession of the Clerk of Court for use by the City in its criminal prosecution which is set for trial on August 31, 1970.

The previously referred to Order of the Honorable A. Paul Lommen compelling return of the second film seized renders part II of the plaintiffs' motion moot.

Parts III, V, and VI of the plaintiffs' motion request relief from the type of activity which would interfere with their First Amendment rights, and will therefore be granted. However, they will be subject to limitations reasonably calculated to insure that the City of Minneapolis will be able effectively to protect the legitimate interests of its citizens. Thus, in the event that plaintiffs cause or permit the motion picture *Sexual Freedom in Denmark* to be exhibited to persons under the age of twenty-one, exhibit or distribute the motion picture in such a manner as to intrude upon individual privacy

or make it impossible for an unwilling individual to avoid exposure to it, or pander or exploit it in such a manner prohibited by the *Ginsberg* case, then the City of Minneapolis will be able to take steps necessary to prevent any further activity of such a nature.

A separate Order is entered.

August 21, 1970.

Earl R. Larson
United States District Judge

APPENDIX B.

Order of District Judge Larson.

Order Granting Motion for a Preliminary Injunction.

United States District Court, District of Minnesota, Fourth Division.

Sexual Freedom in Denmark (Dansk Sexualitet), a Motion Picture Film; Art Films International, Inc., a California Corporation; Michael Kubick, Grace Conoway, and Patrick Phillipe, Plaintiffs, vs. Edward Vavreck, individually, and in his capacity as Assistant City Attorney for the City of Minneapolis; Keith M. Stidd, individually and in his capacity as City Attorney for the City of Minneapolis; Basil Lutz, individually, and in his capacity as Chief of Police of the City of Minneapolis; Jon Prentice, individually, and in his capacity as Supervisor of the Morals Squad of the City of Minneapolis Police Department; and Donald Omdt, individually, and in his capacity as Sheriff of Hennepin County, Defendants. No. 4-70-Civ. 273.

Filed Aug. 24, 1970.

This matter came before the Court on a motion for preliminary or temporary injunction.

The Court has considered the motion and the arguments and briefs of counsel.

On all the files and proceedings herein, including the separate Memorandum filed herewith,

IT IS ORDERED:

That defendants, and each of them, their assistants, agents, successors and all persons acting in concert with them or under their direction, are enjoined:

A. (1) from further seizures or attempted seizures of the film *Sexual Freedom in Denmark.*

(2) from arresting or threatening to arrest any person connected with the exhibition or distribution of the film *Sexual Freedom in Denmark* for any actions arising out of the exhibition or distribution of said film,

B. unless or until

(1) plaintiffs cause or permit the film to be exhibited, distributed or otherwise exposed to persons under 21 years of age, or

(2) plaintiffs exhibit or distribute the film in such a manner as to intrude upon individual privacy or make it impossible for an unwilling individual to avoid exposure to it, or

(3) pander or exploit the film in an offensive manner.

C. (1) from trespassing on the premises where the film is being exhibited

(2) unless the presence of defendants on said premises is pursuant to a duly executed warrant. This provision shall not be construed to authorize actions enjoined by A.(1) and (2) above except where one of the conditions of B. (1) or (2) or (3) above has been met.

August 21, 1970.

/s/ Earl R. Larson
United States District Judge

Separate Memorandum Filed.

APPENDIX C.

Opinion of District Judge Gordon.

Decision and Order.

United States District Court, Eastern District of Wisconsin.

United States of America, Plaintiff, v. George Joseph Orito, Defendant. No. 70-CR-20.

Filed: Oct. 28, 1970.

Two motions to dismiss the indictment are now before the court. In both motions, the defendant contends that 18 U.S.C. § 1462 is unconstitutional. One motion is based on the absence of any provision in the statute requiring proof of scienter; the other is based on the defendant's contention the statute is overbroad and violates the first and ninth amendments in imposing criminal sanctions for the interstate transportation of obscene material which may be designed for personal use.

The defendant was charged in a one-count indictment which alleges that he knowingly transported in interstate commerce, by means of a common carrier, certain "copies of obscene, lewd, lascivious, and filthy materials".

The court must decide whether *Stanley v. Georgia*, 394 U.S. 537 (1969) and *Redrup v. New York*, 386 U.S. 767 (1967) render § 1462 unconstitutional because such section proscribes all transportation of obscene materials without discriminating as to whether such materials are "pandered", exposed to children or imposed on unwilling adults.

The defendant urges that under *Stanley* the transportation and receipt of obscene matter for private use

is constitutionally protected, and that only certain types of public distribution of obscene matter, as described in *Redrup*, may be subjected to governmental control. The United States, on the other hand, urges that *Stanley* did not purport to modify *Roth v. United States*, 354 U.S. 476 (1957) and that, on its limited facts, *Stanley* permits an individual to possess obscene materials in his own home, but it does not grant one a protected right to transport or receive such materials.

In its per curiam opinion in *Redrup v. New York*, 386 U.S. 767 (1967), the court observed that in none of the cases which were then before the court ". . . was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." (p. 769).

Two courts of appeal have decided cases which tend to support the government's position. In *United States v. Melvin*, 419 F.2d 136 (4th Cir. 1969), the court concluded that notwithstanding Stanley, "Congress has the power to forbid interstate transportation of obscenity." (p. 139). Also, in *United States v. Fragus*, 428 F.2d 1211 (5th Cir. 1970), the court rejected a proposed expansion of *Stanley*.

A three-judge court convened in the northern district of Georgia decided "to keep Stanley limited to its facts". *Gable v. Jenkins*, 309 F. Supp. 998, 1000 (N.D. Ga. 1969). This case was summarily affirmed at 397 U.S. 592 (1970).

There are a number of cases in which the rationale of *Stanley* has been construed more broadly than the three decisions referred to immediately above. Thus, in *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969),

probable jurisdiction noted sub nom., Dyson v. Stein, 396 U.S. 954 (1969), *restored to calendar for reargument,* 399 U.S. 922 (1970), a three-judge court asserted that it was "impossible" for the court to ignore the broader implications of the opinion which appears to reject or significantly modify the proposition stated in Roth v. United States . . ." The court went on to say (p. 606):

> "*Stanley* expressly holds that obscenity is protected in the context of mere private possession and in our opinion further suggests that obscenity is deprived of this protection only in the context of 'public action taken or intended to be taken with respect to obscene matter'."

The court in *Stein* concluded that the Texas obscenity statute "as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination." (p. 607).

Another court which considered the impact of *Stanley* is *Karalexis v. Byrne,* 306 F. Supp. 1363 (D. Mass. 1969), *probable jurisdiction noted,* 397 U.S. 985 (1970), *restored to calendar for reargument* 399 U.S. 922 (1970). In that case, a three-judge district court reviewed an obscenity statute which prohibited importing, printing, distributing or possessing obscene matter. The court expressed its conclusion "that public distribution differed from private consumption" and that this distinction also applied to transportation. The court said, at p. 1366:

> ". . . We think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned."

Another recent decision in which the court dismissed counts charging the transportation of obscene material is *United States v. Lethe,* 312 F. Supp. 421 (E.D. Cal. 1970). There the court pointed to the absence of any legitimate governmental interest to justify regulation. Said the court (p. 425):

> "The Supreme Court has recognized the protection of children and the protection of an unwilling public from obtrusive invasions of privacy as proper governmental interest justifying obscenity laws. But neither of these can be used to justify prohibiting mailings to a requesting adult. There is no public display, and children are not involved. No valid governmental interest remains, and the conclusion is inescapable that the government cannot constitutionally bring such a prosecution."

Another case in which a three-judge district court determined the breadth of *Stanley* is *United States v. Thirty-Seven (37) Photographs,* 309 F. Supp. 36 (C.D. Calif. 1970). The United States Supreme Court has recently accepted this case for review. See 39 L.W. 3131. In *Thirty-Seven (37) Photographs,* the court invalidated 18 U.S.C. § 1305, stating (p. 37):

> "It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected. As stated in *Stanley,* the right to read necessarily protects the right to receive."

In *Lethe,* cited above, the court discussed the relationship of the right to possess and the right to receive in these terms (p. 424):

> "If the government has no substantial interest in preventing a citizen from reading books and

> watching films in the privacy of his home, then clearly it can have no greater interest in preventing him from acquiring them."

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the court noted that since married couples have the right to use contraceptive devices, such right would be meaningless if a state could lawfully block such persons from receiving contraceptive devices and instruction. By analogy, it follows that with the right to read obscene matters comes the right to transport or to receive such material when done in a fashion that does not pander it or impose it upon unwilling adults or upon minors.

Although this opinion has concerned itself primarily with *Stanley* and *Redrup* and the cases subsequent thereto which have attempted to apply those decisions, there are a number of other decisions which adopt an obtrusiveness approach. For example, as far back as the year 1948, in *Winters v. New York*, 333 U.S. 507, 515 (1948), the court spoke of "gross and open indecency or obscenity". The pandering theory, adopted in *Ginzburg v. United States*, 383 U.S. 463 (1966), would appear to be bottomed on the concept that brazen and public promotion of prurient material deprives it of its first amendment protection. In a dissenting opinion in *Ginzburg*, Justice Stewart spoke of (p. 498, Note 1):

> ". . . an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it."

I am unable to accept the narrow interpretation of *Stanley* which the government would ascribe to it. I find more reasonable and impressive the analysis and

interpretation adopted by the courts in *Stein v. Batchelor, Karalexis v. Byrne, United States v. Lethe,* and *United States v. Thirty-Seven (37) Photographs.* I find no meaningful distinction between the private possession which was held to be protected in *Stanley* and the non-public transportation which the statute at bar proscribes.

To prevent the pandering of obscene materials or its exposure to children or to unwilling adults, the government has a substantial and valid interest to bar the non-private transportation of such materials. However, the statute which is now before the court does not so delimit the government's prerogatives; on its face, it forbids the transportation of obscene materials. Thus, it applies to non-public transportation in the absence of a special governmental interest. The statute is thus overbroad, in violation of the first and ninth amendments, and is therefore unconstitutional.

In view of the court's conclusion as stated above, the question whether scienter is an essential element of the offense need not be determined by the court.

Now, therefore, IT IS ORDERED that the defendant's motion to dismiss the indictment on the ground that 18 U.S.C. § 1462 is unconstitutional for its violation of the first and ninth amendments of the United States Constitution be and hereby is granted.

Dated at Milwaukee, Wisconsin, this 28th day of October, 1970.

/s/ Myron L. Gordon
U.S. District Judge

APPENDIX D.

Opinion and Judgment of Three Judge District Court.

In the United States District Court, for the District of Oregon.

James A. Hayse, John L. Golden, Harold G. Childs and Fred R. Wunderlich, Plaintiffs, v. George Van Hoomissen, individually and as District Attorney for Multnomah County, Oregon; James C. Holzman, individually and as Director of Public Safety for Multnomah County, Oregon; Norman D. Brown; Donald I. McNamara, individually and as Chief of Police of the City of Portland, Oregon; William J. Budrius; Terry Schrunk, individually, as Mayor of the City of Portland, Oregon, and as a member of the Council of the City of Portland, Oregon; Francis Ivancie, Stanley Earle, Mark Grayson and Lloyd Anderson, individually and as Commissioners of the City of Portland, Oregon and members of the Council thereof; and Marian C. Rushing, individually and as City Attorney of the City of Portland, Oregon, Defendants. Civ. No. 69-743, November 19, 1970.

Before: ELY, Circuit Judge, and BELLONI and GOODWIN, District Judges.

GOODWIN, District Judge:

Plaintiff magazine dealers challenge the constitutionality of Oregon's obscenity laws and seek injunctive and other relief under 42 U.S.C. § 1983.

A three-judge court convened under 28 U.S.C. § 2281 and 2284. Jurisdiction is vested under 28 U.S.C. §§ 1343(3), 2201, and 2202, and 42 U.S.C. §§ 1981-1983.

Plaintiffs' wares feature colored photographs of human reproductive organs and other pictorial and verbal matter dealing extensively with deviant forms of sexual behavior. The material has little, if any, redeeming social value. It appeals primarily to individuals who have an unusual interest in sexual activity. The material is probably "obscene" under the standards outlined in *Roth v. United States,* 354 U.S. 476 (1957); *Childs v. Oregon,* .... F.2d .... (9th Cir., Aug. 4, 1970).

ORS 167.151 provides as follows:

> "(1) No person shall knowingly disseminate obscene matter. A person disseminates obscene matter if he exhibits, sells, delivers, or provides, or offers or agrees to exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture * * *."

The statute defines obscenity as that material which has as its predominant theme an appeal to the prurient interest of the reader or viewer and which is patently offensive and transgresses the customary limits of candor. The Oregon Supreme Court upheld the statute in *State v. Childs,* 252 Or. 91, 447 P.2d 304 (1969), *cert. den.* 394 U.S. 931 (1969).

The pretrial order's agreed statement of facts does not support the plaintiff's contentions of conspiracy and official harassment. These contentions and the prayer for money damages are without merit and will be disregarded. The constitutionality of the municipal ordinance will likewise be disregarded in this case, because the question has been disposed of in *Oregon*

Bookmark Corp. v. Schrunk, Civ. No. 70-294, decided this day.

Plaintiffs in this action do not seek to enjoin a pending state prosectution. Therefore, the anti-injunction statute, 28 U.S.C. § 2283, does not apply. Plaintiffs do seek a permanent injunction against future enforcement of the state statute as well as a declaration of its unconstitutionality. Because this case involves important First Amendment rights, and because the highest court in Oregon has recently upheld the statute, abstention is inappropriate. *Dombroski v. Pfister,* 380 U.S. 479 (1965); *Zwickler v. Koota,* 389 U.S. 241 (1967).

When ORS 167.151 was enacted in 1963, it was consistent with the most recent pronouncements of the Supreme Court in the obscenity field, and was intended to conform to the principles set forth in *Roth v. United States* (and *Alberts v. California*), 354 U.S. 476 (1957). However, the Supreme Court has recently narrowed the permissible scope of state regulation of allegedly obscene material. *Jacobellis v. Ohio,* 378 U.S. 184 (1964); *Memoirs v. Massachusetts,* 383 U.S. 413 (1966); *Redrup v. New York,* 386 U.S. 767 (1967); *Stanley v. Georgia,* 394 U.S. 557 (1969).

Under these most recent Supreme Court decisions, a new doctrine of First Amendment protection has evolved. It is no longer accurate to state categorically that the First Amendment does not protect obscenity. It is now necessary to inquire beyond the mere nature of the published matter, and to look into the government's interest in suppressing it. *Stanley v. Georgia,* 394 U.S. 557 (1969); *United States v. Dellapia,* 39 U.S.L.W. 2218 (2d Cir., October 20, 1970); *Karalexis v. Byrne,* 306 F. Supp. 1363 (D. Mass. 1969), *prob.*

juris. noted, 397 U.S. 985 (1970); *Stein v. Batchelor,* 300 F. Supp. 602 (N.D. Tex.), *prob. juris. noted,* 396 U.S. 954 (1969).

The nature of a legitimate state interest in proscribing obscenity has been described by the Supreme Court in dictum in *Redrup v. New York,* 386 U.S. 767 (1967). The government may properly seek to prevent the exploitation of juveniles, and to prevent an "assault upon individual privacy" by "obstrusive" publication or "pandering." 386 U.S. at 769. The fact that a given publication is "obscene," or that it offends either the elected or self-appointed guardians of the public morality, no longer justifies suppression by the government. Before objectionable matter can be constitutionally suppressed, it must be pandered, obtrusively advertised, or be placed in an environment in which it is likely to fall into the hands of children.

In *Stanley v. Georgia,* the court concluded that the state has no legitimate interest in controlling what an adult reads in the privacy of his own home. 394 U.S. at 565. The court rejected the state's contention that exposure to obscenity in and of itself leads to antisocial behavior. 394 U.S. at 566-567.

The *Stanley* decision adopts for obscenity the traditional balancing-of-interests approach familiar to the free-speech cases. It also emphasizes that, while certain aspects of the distribution process may justify state intervention, the disgusting quality of the material itself is not a proper concern of government where only adults are concerned.

The state argues that the prohibition of possession of obscene materials is necessary to any statutory scheme designed to limit offensive distribution. But any merit

this argument had under the line of cases proceeding from *Roth* has evaporated after *Redrup v. New York*, 386 U.S. 767 (1967). The United States Supreme Court has reversed a dozen state-court convictions Per Curiam on the basis of the prosecutor's failure to show pandering, obstrusive advertising, or the exploitation of a juvenile market. In each case, the material would have qualified as obscene under the *Roth* decision. *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. Tennessee*, 389 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. Louisiana*, 392 U.S. 655 (1968); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Carlos v. New York*, 396 U.S. 119 (1969); *Bloss v. Dykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt v. Minnesota*, 399 U.S. 524 (1970).

The circumstances in which obscenity is distributed and circulated now determine whether it is protected or unprotected by the First Amendment. Since ORS 167.151 proscribes the dissemination of obscene material under all circumstances regardless of how or to whom the material is distributed, it is overbroad and therefore offends the constitutional guarantees of free speech and free press.

We are also forced to hold that ORS 167.151 is overbroad in that it makes it possible for industrious censors to prosecute for activity which is in no respect criminal. The statute declares that a person "disseminates" obscene material if he "exhibits, sells, delivers

or provides" to another, or offers to do so, or possesses such material with intent to do so.

Under the broad language just quoted, the citizen who fills his briefcase with obscene samples and carries them to a Citizens for Decent Literature meeting to reinforce that organization's anxieties will risk criminal prosecution along with those who pander the material commercially in public.

The statute also makes it a crime for a collector to display his pornography to his wife in the privacy of their home. This conduct may be abhorrent to many citizens, but the private enjoyment of literary trash is protected by the First Amendment. *United States v. Dellapia*, 39 U.S.L.W. 2218 (2d Cir., October 20, 1970); *Stanley v. Georgia*, 394 U.S. 557 (1969). Since ORS 167.151 is overbroad, it is constitutionally defective. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

It is therefore DECLARED AND ADJUDGED that ORS 167.151 is unconstitutional on its face. A permanent injunction against enforcement of the statute in the future shall issue.

DATED this 19th day of November, 1970.

Walter Ely
United States Circuit Judge

Robert C. Belloni
United States District Judge

Alfred T. Goodwin
United States District Judge

Declaratory Judgment.

In the United States District Court, for the District of Oregon.

James A. Hayse, John L. Golden, Harold G. Childs and Fred R. Wunderlich, Plaintiffs, v. George Van Hoomissen, individually and as District Attorney for Multnomah County, Oregon; James C. Holzman, individually and as Director of Public Safety for Multnomah County, Oregon; Norman D. Brown: Donald I. McNamara, individually and as Chief of Police of the City of Portland, Oregon; William J. Budrius; Terry Schrunk, individually, as Mayor of the City of Portland, Oregon, and as a member of the Council of the City of Portland, Oregon; Francis Ivancie, Stanley Earl, Mark Grayson and Lloyd Anderson, individually and as Commissioners of the City of Portland, Oregon and members of the Council thereof; and Marian C. Rushing, individually and as City Attorney of the City of Portland, Oregon, Defendants. Civ. No. 69-743.

Filed: Nov. 19, 1970.

Before: ELY, Circuit Judge, and BELLONI and GOODWIN, District Judges.

Pursuant to the opinion filed herewith,

IT IS ORDERED and declared that ORS 167.151 is unconstitutional, and

IT IS FURTHER ORDERED that defendants are enjoined from enforcement of ORS 167.151 in the future.

DATED this 19th day of November, 1970.

Walter Ely
United States Circuit Judge

Robert C. Belloni
Alfred T. Goodwin
United States District Judges

APPENDIX E.

Opinion of District Judge Doyle.

Opinion and Order.

In the United States District Court, for the Western District of Wisconsin.

United States of America, Plaintiff v. B & H Dist. Corp.; Bark Book Dist., Inc.; R. Ford; H. Wasserman and Robert Barkow, Defendants. 70-CR-67.

Defendants have been indicted in three counts under 18 U.S.C. § 1462. The indictment charges that on three separate occasions defendants "did knowingly and unlawfully transport and cause to be transported in interstate commerce by means of a common carrier from New York, State of New York to Wausau, Marathon County in the Western District of Wisconsin, certain obscene, lewd, lascivious and filthy magazines." Defendants move to dismiss the indictment on the grounds that 18 U.S.C. § 1462[1] is overbroad in that it imposes criminal sanctions upon the interstate transportation of obscene material in violation of the First and Ninth Amendments to the United States Constitution.

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[1]Section 1462 provides in pertinent part:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

The obscenity of the materials is not in issue. It is assumed that the magazines are obscene.

Defendants attack the constitutionality of 18 U.S.C. § 1462 on its face. Since this statute clearly involves the area of First Amendment rights and freedoms, defendants are not limited to a construction of the statute as applied to the facts in this case. *Dombrowski v. Pfister,* 380 U.S. 479 (1965); *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963); *Thornhill v. Alabama,* 310 U.S. 88 (1940). Thus "in determining the validity of a statute in relation to the First Amendment, a court must determine what the statute can do. If the statute can violate freedom of speech and press, then it is invalid." *United States v. Thirty-Seven (37) Photographs,* 309 F. Supp. 36, 37 (C.D. Cal. 1970) (three-judge court). *See also Freedman v. Maryland,* 380 U.S. 51 (1965).

Since the United States Supreme Court held in *Roth v. United States,* 354 U.S. 476 (1957), that obscenity was not within the area of constitutionally protected speech or press, numerous First Amendment attacks on statutes similar to 18 U.S.C. § 1462 have been summarily dismissed. But the Supreme Court recently has retreated from its absolute position in *Roth* by holding in *Stanley v. Georgia,* 394 U.S. 557 (1969), that the First Amendment prohibits making private possession of obscene material a crime. Precisely what effect *Stanley* has on obscenity and First Amendment protection beyond private possession in a home is much debated.[2]

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[2]The implications of *Stanley v. Georgia* have been discussed in several articles: e.g., Note, *The New Metaphysics of Law and Obscenity,* 57 Calif. L. Rev. 1257 (1969); Gegan, *The Twilight*

(This footnote is continued on the next page)

In *Stanley* the court specifically stated that "*Roth* and the cases following that decision are not impaired by today's holding," 394 U.S. at 568. Obviously, this cannot be taken to mean that obscenity in every context remains beyond the protection of the First Amendment. The court ruled otherwise. It declined to extend its holding beyond possession of obscene matter in the privacy of one's home. But *Stanley's* broader implications are inescapable.

A number of recent decisions applying *Stanley* have read it to distinguish between private uses or actions which are protected by the First Amendment, and public (or commercial) uses or actions which are not. *United States v. Lethe,* 312 F. Supp. 421 (E.D. Cal. 1970); *Karalexis v. Byrne,* 306 F. Supp. 1363 (D. Mass. 1969) (three-judge court), *prob. juris. noted,* 397 U.S. 985, *restored to calendar for reargument,* 399 U.S. 922 (1970); *United States v. Articles of "Obscene" Merchandise,* 315 F. Supp. 191 (S.D.N.Y. 1970) (three-judge court); *Stein v. Batchelor,* 300 F. Supp. 602 (N.D. Tex. 1969) (three-judge court); *prob. juris. noted,* 394 U.S. 954 (1969); *United States v. Orito,* No. 70-CR-20 (E.D. Wis., Oct. 28, 1970); *United States v. Dellapia,* No. 34858 (2d Cir., Oct. 20, 1970). In *Stanley* the court acknowledged this distinction when it spoke of *Roth:* "But that case dealt with *public* distribution of obscene materials and such distribution is subject to different objections," 394 U.S.

of Nonspeech, 15 Cath. Law. 210 (1969); D. Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing,* 68 Mich. L. Rev. 185 (1969); 83 Harv. L. Rev. 147 (1969).

at 567 (emphasis added). This interpretation of *Stanley* appears in *Stein v. Batchelor,* 300 F. Supp. 602 (N.D. Tex. 1969) at 606:

> "Although the narrow holding of *Stanley* is simply that 'the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime', we think that the case also stands for a broader proposition. Since *Stanley* involved a direct review of a state conviction for possession of obscene matter, the narrow holding was sufficient to reverse the conviction; thus it was not necessary for the Court to base its decision on a broader ground. It is impossible, however, for this Court to ignore the broader implications of the opinion which appears to reject or significantly modify the proposition stated in Roth v. United States, 354 U.S. 476, 485, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957) that 'obscenity is not within the area of constitutionally protected speech or press'.
>
> . . .
>
> "*Stanley* expressly holds that obscenity is protected in the context of mere private possession and in our opinion further suggests that obscenity is deprived of this protection only in the context of 'public actions taken or intended to be taken with respect to obscene matter'."

This distinction is rooted in governmental goals or interests thought to be valid. In *United States v. Lethe,* 312 F. Supp. 421 (E.D. Cal. 1970), the court succinctly set forth the possible governmental goals (at 424):

> "There are basically only four goals which have been used to justify restrictions on dissemination

> of obscene material: (1) preventing crimes of sexual violence, (2) protecting the society's moral fabric, (3) protecting children from exposure to obscenity, and (4) preventing 'assaults' on the sensibilities of an unwilling public."

The *Lethe* court then observed, and I agree that in *Stanley* the Supreme Court rejected goals (1) and (2) as adequate justifications for anti-obscenity legislation. With respect to goal (2), the Supreme Court said:

> ". . . Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. . . . Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. . . . Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." 394 U.S., at 565-566.

I note the words "public dissemination of ideas inimical to the public morality." and I will comment later herein on the definition of "public" which *Stanley* appears

to require. With respect to goal (1), as stated in the *Lethe* opinion, the Supreme Court said in *Stanley*:

> "Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. But more important, if the State is only concerned about printed or filmed materials inducing anti-social conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law * * *.' Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). * * * Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." 394 U.S. at 566-567.

Again, I note the phrase "the context of private consumption of ideas and information," and I will comment in a moment upon the definition of "private" which *Stanley* appears to require.

The remaining two goals or interests catalogued in *Lethe* are: protecting children from exposure to obscenity, and preventing assaults on the sensibilities of an unwilling adult public. These two goals or interests have been recognized as justification for governmental prohibitions against obscenity, *Ginsberg v. New York*, 390 U.S. 629 (1968), *Redrup v. New York*, 386 U.S.

767 (1967), *Butler v. Michigan*, 352 U.S. 380 (1956), but only these two goals or interests appear to have survived *Stanley*. Uses or conduct which are in conflict with these two goals or interests, it appears, do not enjoy the protection of the First Amendment and may be prohibited and punished by government. But uses or conduct which are not in conflict with these two goals or interests enjoy the protection of the First Amendment and may not be prohibited or punished. *Stanley v. Georgia, supra; United States v. Lethe*, 312 F. Supp. 421 (E.D. Cal. 1970); *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969); *Karalexis v. Byrne*, 306 F. Supp. 1363 (D. Mass. 1969); *United States v. Orito*, No. 70-CR-20 (E.D. Wis., Oct. 28, 1970).

I believe that the continued use of the terms "public" and "private" is confusing because the test of constitutionality to be applied since *Stanley* must be the test of whether the proscribed uses or conduct are in conflict with either of the two permissible governmental goals. If the terms must be employed, then "public" uses or conduct must be defined as those which are in conflict with the goal or interest of protecting children from exposure to obscenity or with the goal or interest of preventing assaults on the sensibilities of an unwilling adult public; "private" uses or conduct must be defined as those which are not so in conflict.

Section 1462 does not discriminate in any way between those uses or conduct which are in conflict with the two permissible governmental goals or interests and those uses or conduct which are not so in conflict. This failure to discriminate, in itself, may render the statute fatally overbroad. But because in *Stanley* the specific use of obscene materials held to be within the protection of the First Amendment was possession in a home,

it may be necessary to determine whether the validity of governmental regulation of transportation of obscene materials, as well as the validity of governmental regulation of possession in a home, depends upon whether the attempted regulation is limited to one or both of the two constitutionally permissible goals or interests.

The government contends that *Stanley* recognizes no constitutional right to receive obscene materials, but rather only a right to be free from intrusive inquiry by the state into those materials which an individual may read or use in his home.[3] This argument is not persuasive:

> "If the government has no substantial interest in preventing a citizen from reading books and watching films in the privacy of his home, then clearly it can have no greater interest in preventing or prohibiting him from acquiring them. The only possible purpose in preventing him from acquiring them is to prevent him from enjoying them." *United States v. Lethe, supra,* 312 F. Supp. at 424.

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[3]The government also contends that *Stanley* does not mean that obscenity is protected by the First Amendment, but rather that the values which the Fourth Amendment and other provisions of the Bill of Rights seek to protect would be endangered by the government searches, seizures, and punishment necessary to enforce the Georgia statute. I agree that other constitutional issues are raised when the state seeks to prohibit possession in a home. In *Stanley* the court was aware of these issues. But it grounded its decision solely on First Amendment rights (at 565):

> "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."

In *Stanley* the Court acknowledged the right to receive information and ideas regardless of their social value, 394 U.S. at 564:

> "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive. . . .' *Martin v. City of Struthers,* 319 U.S. 141, 143 (1943); see *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965); *Lamont v. Postmaster General,* 381 U.S. 301, 307-308 (1965) (Brennan, J., concurring); cf. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). This right to receive information and ideas, regardless of their social worth, see *Winters v. New York,* 333 U.S. 507, 510 (1948), is fundamental to our free society."

A number of obscenity statutes have been found unconstitutional on the basis that they violate the individual's right to receive obscene matter for uses which neither expose children to obscenity nor assault the sensibilities of an unwilling adult public. *United States v. Lethe, supra* (18 U.S.C. § 1461 (Mailing Obscene Matter)); *United States v. Thirty-Seven (37) Photographs,* 309 F. Supp. 36 (C.D. Cal. 1970) (19 U.S.C. § 1305 (Immoral Articles; Prohibition of Importation)); *United States v. Articles of "Obscene" Merchandise,* 315 F. Supp. 191 (S.D.N.Y. 1970) (19 U.S.C. § 1305).

Recognizing that the First Amendment protects the individual's right to receive obscene materials for such uses, I believe that the dissemination of obscene matter through interstate transportation, in a manner which itself neither exposes children to obscenity nor as-

saults the sensibility of an unwilling adult public, cannot be less protected. The government cannot indirectly prevent an individual from receiving obscene matter for permissible uses by making it a crime to disseminate or transport the materials to him. *United States v. Lethe, supra; Karalexis v. Byrne,* 306 F. Supp. 1363 (D. Mass. 1969). By analogizing to *Griswold v. Connecticut,* 381 U.S. 479 (1965), the court reached this same conclusion in *United States v. Orito, supra* (slip opinion, p. 5):

> "In *Griswold* . . ., the court noted that since married couples have the right to use contraceptive devices, such right would be meaningless if a state could lawfully block such persons from receiving contraceptive devices and instruction. By analogy, it follows that with the right to read obscene matters come the right to transport or to receive such material when done in a fashion that does not pander it or impose it upon unwilling adults or upon minors."

The government relies heavily upon three decisions. In *United States v. Melvin,* 419 F.2d 136 (4th Cir. 1969), the court refused to extend *Stanley* beyond possession of obscene material in a home. I think the court did not appreciate the full implications of *Stanley,* and I cannot accept its narrow interpretation.

In *United States v. Fragus,* in an opinion entered June 23, 1970 (No. 27801), supplementing its earlier opinion, 422 F.2d 1244 (5th Cir. 1970), the court declined to extend *Stanley* to interstate transportation. The court relied mainly on *Gable v. Jenkins,* 309 F. Supp. 998 (N.D. Ga. 1969) (three-judge court), *aff'd* 397 U.S. 592 (1970).

In *Gable v. Jenkins* the plaintiff challenged as overbroad a Georgia statute which prohibited distribution of obscene materials. The plaintiff was engaged in the business of distributing books and magazines. He objected to a portion of the statute[4] which prohibits dissemination of obscene material "to any person." The court found that the words of the *Stanley* opinion "indicate a conscious desire on the part of the Court to keep *Stanley* limited to its facts and no statements in the body of the opinion could logically be construed to encompass the contention of plaintiff." 309 F. Supp., at 1000. It continued:

> "Plaintiff divines several situations under which the working of [the Georgia statute] might be overly broad, viz., a husband showing an obscene book to his wife, or consenting adults being prohibited from gathering in a private home to view an obscene film."

The *Gable* court found that these "private" uses were not present in the case before it, and considered itself free, therefore, to ignore such possible applications of the statute.

Because the Georgia statute obviously dealt with expression in written form, I believe that the *Gable* court was not free to disregard these possible applications to private uses. But it did clearly disregard them, and must be read as sustaining a prohibition only against dissemination of obscene materials in a manner, or for the purpose of facilitating uses or conduct, which exposes children to obscenity or assaults the sensibilities of unwilling adults. Moreover, it does not appear that the contention was presented to the court, and in any event the court makes no reference to the point,

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[4]Ga.L. 1968, p. 1249, 26 Ga. Code 2101(a).

that the right to read an obscene book in one's home is dependent upon one's right to buy it at a bookstore and the book dealer's right to sell it to the prospective home-reader. That the judgment of dismissal in *Gable* was affirmed in an inscrutable four-word decision, 397 U.S. 592, is troublesome. It is difficult to suppose that the Supreme Court chose so obscurely to deal with the application of the statute to "private" uses, when the lower court had declined to consider such application. Accordingly, I consider that the action of the Supreme Court in *Gable* does not foreclose a fresh inquiry in the present case into the possible application of 18 U.S.C. § 1462 to uses which neither expose children to obscenity nor assault the sensibilities of unwilling adults.[5]

Section 1462 fails to distinguish between transportation which presents danger to minors or the danger of obtrusion upon unwilling adults and transportation which does not present these dangers. Accordingly, I find it unconstitutionally overbroad, in violation of the First and Ninth Amendments.

Therefore, for the reasons stated above, and upon the basis of the entire record herein, IT IS ORDERED that the defendants' motion to dismiss the indictment is hereby granted.

Entered this 24th day of November, 1970.

By the Court:

/s/ James E. Doyle
District Judge

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[5]In this opinion I have considered that the expressions "exposing children to obscenity" and "assaulting the sensibilities of unwilling adults" are broad enough to include the term "pandering," which frequently appears in court decisions and other literature on the subject.